Supreme Court of the United States

OCTOBER TERM, 1941.

No. 841.

SUSAN G. REEVES, PETITIONER,

VS.

WILLIAM BEARDALL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF SUSAN J. GRAHAM, DECEASED, RESPONDENT.

BRIEF OF RESPONDENT ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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A reference to the record in this case exhibiting the complaint, pages one to six and exhibits following, and amendment to count 2, page 38, and the final judgment, page 47, will disclose that the complaint exhibited three separate distinct and independent claims:

First count on promissory note a common law action; second count, a suit for specific performance of a contract to make a will or not to change a will based on a contract, separate and distinct from the promissory note; third count, an accounting from an individual not in any

way connected with the defendant in counts 1 and 2. Therefore, each of these claims is separate and distinct.

Under the old practice the cause of action in count 1 would have been at common law triable by jury and could not have been joined in the same suit with the claim in counts 2 and 3.

Under the old procedure the cause of action in count 2 is strictly an equity action and could not have been joined with count 1 or count 3.

Under the old procedure count 3 is strictly an equity action and could not have been joined in the same suit with count 2 and count 1 or with either of them.

Therefore, solely by virtue of Rule 18, Rules of Civil Procedure, was it permissible to join these three separate and distinct independent claims. There is probably some question of the right under Rule 18 or any other rule of Rules of Civil Procedure to maintain the third count, but that is immaterial to this proceeding.

By virtue of Rule 54, Rules of Civil Procedure, it distinctly provided:

> "The court, at any stage upon the determination of issues material to a particular claim, may enter a judgment disposing of such claim. The judgment shall terminate the action with respect to the claim so disposed of and the action shall proceed as to the remaining claims."

We now turn to Section 230, Title 28, United States Code Annotated, and we find the statute providing that three months are allowed for application for appeal after the entry of judgment or decree and review of same by the Circuit Court of Appeals.

It has been held uniformly that the statute is mandatory and jurisdictional and it has likewise been uniformly held that the time cannot be extended by any court.

Now this rule 54 means what it says or it doesn't mean what it says. If the judgment in the case at bar terminated the action with respect to the claim in Count 2, then the time for taking an appeal from that judgment would expire three months from the date of the entry of the judgment, and it seems plain that it is mandatory on the part of the aggrieved party that he must assert his right of appeal within the three months when judgment is entered under this rule, or he will be barred.

We concur with the petitioner in the brief filed in support of the petition and the authorities therein cited.

The decision in the Circuit Court of Appeals, Fifth Circuit, simply dismissed the appeal on the ground that the appeal sued out in said cause was taken from a judgment that is not final (Page 55, transcript of record).

None of the attorneys can find anything else further to do in regard to Count 2, and the cause of action or claim therein set up. The final judgment (page 47 and 48 of transcript) is a final disposition of that count and the claim therein alleged, the language being:

> "That this suit, as set out in Count 2 of plaintiff's complaint, be, and the same is hereby, dismissed as to William Beardall, etc., and that plaintiff Susan G. Reeves take nothing by her plaint and that the defendant, etc., go hence without day."

This is both an equity decree and a judgment at law.

Apparently the Circuit Court of Appeals, Fifth Circuit, had in mind its opinion in the case of *Hunteman v. New Orleans Public Service, Inc., et al.*; 119 F. 2d 465, where it dismissed an unlike case where two parties had been sued in the same count on the same cause of action and it dismissed an appeal because the case hadn't been finally disposed of as to the other parties. This case was not brought nor governed by Rules 18 and 54 or any other rules of Civil Procedure as to joinder of parties, cause of actions or the entry of final judgment.

It thus appears that the action of the Circuit Court of Appeals is directly in conflict with decisions of other Circuit Courts of Appeal as cited in the brief of petitioner and brings this case within the provisions of paragraph 5, rule 38 of this court, Subdivision B, in these particulars:

1. The Circuit Court of Appeals has rendered a decision in conflict with a decision of another Circuit Court of Appeals on the same subject matter.

2. It has decided an important question of federal law which has not been, but should be, settled by this Court.

We submit that if Rule 18 means what it says, then in cases of this kind when a final judgment has been entered on one separate and distinct claim between the same parties, it is of the utmost importance to the public that this court establish the law as to whether or not the limitations for appeal do not then begin to run, as it seems plain on the face of the rule and on the face of the statute that the limitations would begin to run on the entry of the judgment under the circumstances disclosed in this case.

Other Circuit Courts of Appeal, as set out in petitioner's brief, have held that under these rules an appeal will lie from the final judgment. Now since it is not discretionary as to when a person may take an appeal, but the time is unalterably fixed by statute above cited, it does not appear reasonable or sensible that it will be left up to the litigant on final judgments of this kind for him to determine in his discretion or as he may please, that he can sit around for months and months until other claims have been determined and keep the party in whose favor a final judgment has been entered an undetermined length of time, but as to the particular separate claim on which final judgment has been entered, the party in whose favor the judgment has been entered should be

put at his ease after the time for taking an appeal has elapsed and not be held in court indefinitely on matters in which he is not interested.

Section 225, United States Code Annotated, Title 28, provides for appellate jurisdiction of Circuit Courts of Appeal, and states:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal, etc., final decisions—
>
> "First in the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of the same title."

It would be a travesty on the English language to assert, it seems to us, that the final judgment on Count 2 in this case is not a final decision within the meaning of these statutes and the rules of civil procedure above cited.

We therefore respectfully submit that the Court should grant the writ and settle the point.

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